TABLE OF CONTENTS

	Page
INDEX OF AUTHORITIES CITED	ii
STATEMENT OF THE CASE	1
ARGUMENT	
I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY PRIOR DECISIONS	3
II. IT IS UNDISPUTED FROM THE RECORD THAT THE INSURED WAS AWARE OF HIS HEART CONDITION AND THAT IT WAS A SERIOUS CONDITION	7
III. THE QUESTIONS ON THE APPLICATION CALLED FOR THE DISCLOSURE OF MR. VYE'S CONSULTATION WITH DR. BECKER AND OF HIS HEART CONDITION	8
IV. THE SIXTH CIRCUIT'S OPINION DOES NOT DEPRIVE PETITIONER OF HIS RIGHT TO A JURY TRIAL	10
V. PETITIONER HAS DEMONSTRATED NO GROUNDS FOR THIS COURT TO GRANT CERTIORARI	13
CONCLUSION	14

INDEX OF AUTHORITIES CITED

Cases:

	Page
Archese v. *Equitable Life Assur. Soc.*, 223 N.Y.S.2d 95 (1961)	13
Bellestri-Fontana v. *New York Life Ins. Co.*, 234 Mich. 424, 208 N.W. 427 (1926)	11
Ettman v. *Equitable Life Assur. Soc.*, 174 N.Y.S.2d 553 (1958)	12
Franklin Life v. *William J. Champion & Co.*, 350 F.2d 115, *Cert. denied*, 384 U.S. 928 (1965)	3, 4
Greene v. *United Mutual Life Ins. Co.*, 283 N.Y.S.2d 809 (1963)	13
Home Life Ins. Co. v. *Kupfer*, 117 N.Y.S.2d 352 (1952)	13
Lipsky v. *Washington National Ins. Co.*, 7 Mich. App. 632, 152 N.W.2d 702 (1967)	4, 5
Metropolitan Life Ins. Co. v. *Carter*, 252 Mich. 432, 233 N.W. 370 (1930)	12
Mutual Benefit Life Ins. Co. v. *Abbott*, 9 Mich. App. 547, 157 N.W.2d 806 (1968)	4, 5
New York Life Ins. Co. v. *Bahadurian*, 252 Mich. 491, 233 N.W. 390 (1930)	12
Reznekoff v. *Equitable Life Assur. Co.*, 45 N.Y.S.2d 650 (1943)	13
Smith v. *Reinauer Oil Transport*, 256 F.2d 646 (1st Cir. 1958)	10
Wageman v. *Metropolitan Life Ins. Co.*, 263 N.Y.S.2d 915 (1965)	12
Woodall Industries, Inc. v. *Massachusetts Mutual Life Ins. Co.*, 483 F.2d 986 (6th Cir. 1973), rehearing denied, 483 F.2d 1007 (6th Cir. 1973)	
Other:	
New York Insurance Law §149(2)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

WOODALL INDUSTRIES, INC.,
a Delaware corporation,
Petitioner,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Massachusetts corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

The following statement is submitted to supply additional facts which respondent believes to be necessary to consideration of the Petition. These facts were uncontroverted:

On November 6, 1966, John H. Vye consulted Dr. Paul Becker with a complaint of rectal bleeding (T.41).* During the course of his examination, Dr. Becker detected a diastolic heart murmur (T.46). Dr. Becker (T.57), Dr. Nay (T.214), and Dr. MacQueen (T.288-89) all agreed that a diastolic heart murmur is both a significant medical finding

---

*Transcript references are to the original transcript pages.

and a serious condition. Dr. Becker specifically advised Vye that the murmur he had detected was a diastolic murmur and that his finding was significant:

> "Q. What did you tell him about the heart condition?
>
> A. Told him that, in my opinion, he had a significant heart murmur which I considered secondary to a defective aortic valve and possibly related to the scarlet fever history he gave me, from childhood; that the heart disease at the present time was not causing him any trouble; he was not symptomatic; that it needed no specific treatment; that it needed as many other things in a medical examination, to keep this heart in surveillance to see whether this presumed aortic insufficiency got worse. If symptoms appeared at that time, he needed treatment. Certainly this is something which I think you should have checked again by me or by anyone, just have it checked again.
>
> * * *
>
> Q. Well, you, I believe, told him to have it checked by his company examination?
>
> A. Physician of his choice, anyone, just make him aware of the fact that I heard a murmur which I considered significant.
>
> Q. Did you use the word 'significant' to him?
>
> A. Yes.
>
> Q. And did you use the word 'diastolic' to him?
>
> A. I am quite certain I did." (T. 74-5)

One month later, at Dr. Becker's request, Mr. Vye had a chest x-ray which disclosed a mild enlargement of the left heart chamber which was compatible with Dr. Becker's diagnosis of aortic valvular heart disease (T.51-3). The results of this x-ray were given by Dr. Becker either to Mr. Vye or his wife by phone (T.53, 80-1).

The application for insurance completed by Mr. Vye on November 20, 1967, contained certain questions about Mr.

Vye's medical history. Two of the questions read as follows:

> "4. During the past ten years have you had
> A. Advice from or attendance or treatment by physicians, other practitioners or psychologists,
> yes
> D. X-ray, electrocardiographic or blood examinations
> yes
> 6. At any time have you had any known indication of or been told that you had
> A. Any disorder of the heart or blood vessels,
> no"

Vye did not disclose in his answer to these application questions his visit to Dr. Becker, the examination Dr. Becker conducted, the medical problem which led to his consultation with Dr. Becker, or that Dr. Becker had *told* him he had a significant heart condition (T.168-70, 190-1, 196). The heart murmur in question was material to the risk and hazard assumed by respondent in issuing the policy and it would not have issued the policy had it known the true facts concerning Vye's visit to Dr. Becker and the findings which Dr. Becker made during his examination (T.211-15). No contrary evidence was offered.

Respondent's Motion for Directed Verdict and for Judgment Notwithstanding Verdict were both denied by the trial Judge.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY PRIOR DECISIONS

Petitioner argues that the Sixth Circuit's opinion is in conflict with its earlier decision in *Franklin Life* v. *William*

J. Champion and Co., 350 F.2d 115, *Cert. Denied*, 384 U.S. 928 (1965) and with two decisions of the Michigan Court of Appeals: *Lipsky* v. *Washington National Ins. Co.*. 7 Mich. App. 632, 152 N.W.2d 702 (1967) and *Mutual Benefit Life Ins. Co.* v. *Abbott*, 9 Mich. App. 547, 157 N.W.2d 806 (1968). The Circuit Court held otherwise and a close examination of these three decisions demonstrates that the Sixth Circuit's opinion in this case is both consistent with and complementary to the three decisions in question.

The holdings in *Franklin, Lipsky,* and *Abbott* are, for all intents and purposes, the same. In all three, although the insureds had received some treatment for a medical condition, at the time the insurance application was completed, they were not aware of either the seriousness of the condition or, in fact, the condition itself. Thus, in *Lipsky*, the insured, based upon what he had been told by his daughter's doctor, could state his daughter's condition was not a serious one; the insured in *Franklin* could state that he was "in good health" since the brain tumor had not as yet been diagnosed; and the insured in *Abbott* could state that he did not know he had an ulcer. The rule emerging from the three cases is that the truth or falsity of answers to questions in an insurance application must be examined in light of what the applicant knew at the time. An applicant cannot be held accountable for conditions or diagnoses which do *not* become known to him until after the application is signed.

The Sixth Circuit, however, accurately pointed out the distinction between the factual situation in the instant case and that which was involved in the three decisions referred to above. Judge Kent stated:

> "Plaintiff relies upon the *Franklin Life Insurance Company* decision, but it appears to this Court that

its reliance is misplaced. In that case the policyholder was asked in *an application for reinstatement whether he was in good health,* the answer was in the affirmative although in fact he was at the time afflicted with cancer from which he ultimately died. The existence of the cancer was unknown to the applicant. The court in *Franklin Life,* in a very carefully considered and exhaustive opinion, held that under Michigan law the statement as to his good health made by the insured was an innocent representation and an honest answer to the question propounded. The Court said at page 126 of 350 F.2d:

'If such statements, or representations, as to good health are made in good faith, they are to be understood by the insurer to be only bona fide representations that the applicant is in good health according to the best of his belief and without any reasonable cause on his part to believe that he is not in good health. In such a case this kind of statement, or representation, is to be deemed not material to the assumption of the risk.' At 126.

The Michigan Court of Appeals has accepted without qualification Judge McAllister's interpretation of the law of the issue stated. *Lipsky* v. *Washington National Insurance Co.,* 7 Mich. App. 632, 150 N.W.2d 702 (1967); *Mutual Benefit Life Insurance Co.* v. *Abbott,* 9 Mich. App. 547, 157 N.W.2d 806 (1968). *But it appears without any question that in each of the cases cited the answer given by the insured was an honest answer to a question asking an opinion. Such is not the case here.* Rather this case more clearly resembles *Dedic* v. *Prudential Insurance Co,.* 14 Mich. App. 274; 165 N.W.2d 295 (1968); in *Dedic* the insured failed to disclose a number of consultations with physicians. The only issue before the court was whether this failure to disclose was material to the risk. The trial court granted a directed verdict in favor of the insurance company which was affirmed on appeal." (Emphasis added).

In *Franklin Life,* the issue involved a reinstatement application which required the applicant to state whether he was "in good health." The principle enunciated therein is both consistent with and complementary to the Sixth Circuit's decision in this case. On one hand, if an applicant does not know the true nature of a medical condition, has not been told what it is, or if the condition has not even been discovered, it would be patently unfair to employ hindsight and conclude that the applicant should have known precisely what the condition was when the application was completed. Such a rule would make a good faith standard meaningless and require the applicant to be both a physician and a fortune teller. Accordingly, *Franklin* correctly held that the truth or falsity of an answer must be determined in light of what the applicant knew at the time he completed the application. On the other hand, as in the instant case, if the applicant has been told he suffers from a certain condition and if he has known indications of that condition, a good faith standard requires he disclose this in the insurance application. Similarly, if a question ask for the names of physicians seen in the last ten years—and the applicant has seen a physician in that period—a good faith standard requires him to disclose the physicians' names to the insurer so that it can investigate the nature of any treatment or findings by the physician. This does not require the applicant to prognosticate or be a physician; it merely requires a truthful response as to what he has been told and the names of doctors he has seen. Without such information, the insurer is deprived of its right to intelligently evaluate the risk it is being asked to assume.

II. IT IS UNDISPUTED FROM THE RECORD THAT THE INSURED WAS AWARE OF HIS HEART CONDITION AND THAT IT WAS A SERIOUS CONDITION

Petitioner argues that Mr. Vye did not know he had a "disorder of the heart" and that, in any event, the heart murmur which he did have was not a serious condition. The Circuit Court, however, held that the record indicated the contrary. As indicated in respondent's statement of the case and the exerpts below, Dr. Becker clearly advised Vye of his condition. All of the doctors who testified on the question at trial were in complete agreement on the conclusion that a diastolic murmur such as Mr. Vye had was both a significant murmur and a serious condition. Dr. Becker, on cross-examination, testified as follows:

> "Q. What did you tell him about the heart condition,
>
> A. Told him that in my opinion he had a significant heart murmur . . .
>
> * * *
>
> Q. Did you use the word 'significant?'
>
> A. Yes.
>
> Q. And did you use the word 'diastolic' to him?
>
> A. I am quite certain I did." (T. 74-5)

Dr. Nay testified:

> "Q. Would this condition have been a material factor in your decision, the company's decision, whether to accept this application and assume this risk?
>
> A. It certainly would.
>
> Q. For what reason?
>
> A. The impairment mentioned in Dr. Becker's report or which would have been mentioned in Dr. Becker's report of a diastolic murmur in the aortic area is sufficient to put this risk beyond the classification that we would care to insure." (T. 214)

Finally, Dr. MacQueen testified:

"Q. Would you consider a diastolic murmur more serious?

A. Yes, very much so.

Q. In what way?

A. Well, it puts more work on the heart. And as it progresses, life progresses, the stricture of the valve generally becomes more severe.

Q. Is that an indication of aortic insufficiency?

A. No, it could be in the aorta, it could be in any value of the heart.

Q. But in any event it is serious?

A. Yes." (T. 288-89)

The conclusion urged by petitioner that the diastolic heart murmur, admittedly diagnosed by Dr. Becker and confirmed by others at the time of Vye's final illness, was not an "abnormality" or a "serious" ailment is a conclusion of counsel only. It was not the conclusion of the three medical experts who testified at trial. Dr. Becker agreed that Mr. Vye was asymptomatic and he agreed that his advice to Vye was to have the condition checked and watched in the future. He did not, however, agree that it was inconsequential or a minor ailment. The murmur *itself* was an abnormality. The murmur *itself* was a significant and serious condition. The murmur *itself* was sufficient to put this risk beyond the classification of this insurer and the insurance industry generally.

III. THE QUESTIONS ON THE APPLICATION CALLED FOR THE DISCLOSURE OF MR. VYE'S CONSULTATION WITH DR. BECKER AND OF HIS HEART CONDITION

Petitioner has consistently maintained that the application questions did not require Vye to disclose either his heart condition or the fact that he was treated by Dr. Becker. Judge Kent, however, held:

> "To summarize: There can be no question but what the insured knew that he had been examined by Dr. Paul Becker and from conversations at the time of his last illness, testified to by Dr. Becker, and undisputed, it is eminently clear that the insured continued to be aware of the heart difficulty which Dr. Becker had discovered and disclosed to the insured. It is undisputed on this record that had the defendant insurance company had knowledge of the facts misrepresented (by the untruthful answers to questions 3 and 4. and particularly question 6), it would have refused to make the contract of insurance upon which the verdict depends. For the reasons herein stated we conclude that the answers given by the insured were misrepresentations which were material within the meaning of the statute cited. M.C.L.A. 500.2218, M.S.A. 24.12218. Under these facts the motion for directed verdict made on behalf of defendant should have been granted. *Dick* v. *John Hancock Mutual Life Insurance Co.*, 434 F.2d 808 (6th Cir. 1970)."

As the Sixth Circuit's opinion points out, the questions involved in the medical application in this case do not call for questions of opinion or conclusions requiring medical knowledge by a layman. Question 4 asked for the name of all doctors consulted by Mr. Vye in the ten years preceding the ten years preceding the date of the application. Dr. Becker's name is not included in the answer made to this question. Mr. Vye certainly could not have had any doubt as to whether he had consulted Dr. Becker—it is an established fact that he did. For petitioner to argue that Mr. Vye correctly answered question 4 on the application when it is undisputed Mr. Vye had consulted Dr. Becker completely ignores the evidence. Petitioner rather chooses to ignore any discussion of question 4 while making the sweep-

ing generalization that all questions on the application were fully and completely answered.

Petitioner further argues that Mr. Vye had never been *told* that he had a heart murmur and even implies that he did not, in fact, have such a murmur. His argument flies in face of the record in which Dr. Becker repeatedly testified that the murmur was detected both in his 1966 examination and in Mr. Vye's final illness and that the finding of this murmur had clearly been communicated to Vye. In connection with question 6, Vye not only clearly had a disorder of the heart, but he had clearly and undeniably been told that he had such a condition.

IV. THE SIXTH CIRCUIT'S OPINION DOES NOT DEPRIVE PETITIONER OF HIS RIGHT TO A JURY TRIAL

Petitioner argues that the decision of the Circuit Court denies its right to a jury trial as guaranteed by the Seventh Amendment to the United States Constitution. This right, of course, is not unqualified. The judgmental grant of a directed verdict or judgment notwithstanding the verdict does not amount, at least in all cases, to a denial of the right to a jury trial. See, *e.g. Smith* v. *Reinauer Oil Transport*, 256 F.2d 646 (1st Cir. 1958).

Petitioner's argument is predicated on the misplaced assumption that the question of materiality *in this case and on this record* was one for jury determination. The argument is refuted by Judge Kent in his opinion:

> ". . . it is not for an applicant to determine that which is and that which is not material to an insurance company's acceptance of a risk. The *uncontradicted* testimony of C. Paul Nay, Chief Medical Director of the defendant insurance company, was

> that the policy would not have issued if the company had been informed of Dr. Becker's examination, findings, and advice to Mr. Vye. With that testimony the misstatements in the application were clearly material misrepresentations under the statute cited. No question on the application for insurance suggested to the insured that it was for him to determine what was material to the risk. At the time of application, Mr. Vye had one obligation and only one obligation, to make truthful answers, as the truth was known to him, to the questions asked of him. Obviously he did not do this and, on this record, no court or jury would be justified in reaching the conclusion that the untruthful answers were made inadvertently or through lack of knowledge." (Emphasis added)

Several decisions in Michigan and New York (under an identical statute governing materiality*) indicate the propriety of taking the case from the jury under similar circumstances. In *Bellestri-Fontana* v. *New York Life Ins. Co.*, 234 Mich. 424, 208 N.W. 427 (1926), plaintiff, in his application for life insurance, failed to include the name of a physician he had consulted in the five years preceding the date of the application and also failed to disclose a stomach condition for which he had received treatment. At trial, the insurer moved for a directed verdict and, following a jury verdict in favor of the plaintiff, moved for a judgment notwithstanding the verdict. The Michigan Supreme Court, in language almost identical to that used by Judge Kent in the Sixth Circuit's opinion, held that plaintiff had concealed a material fact which the insurer had a right to know and that the omitted information bore a direct relation to acceptance of the risk assumed by the insurer.

---

*New York Insurance Law, §149(2).

The Court, in discussing whether the case should have been submitted for jury determination, held:

> "Defendant was entitled to a directed verdict under the undisputed evidence. The court should have entered judgment for defendant notwithstanding the verdict of the jury." At 426.

See, also, *Metropolitan Life Ins. Co.* v. *Carter*, 252 Mich. 432, 233 N.W. 370 (1930) and *New York Life Ins. Co.* v. *Bahadurian*, 252 Mich. 491, 233 N.W. 390 (1930).

In *Ettman* v. *Equitable Life Assur. Soc.*, 174 N.Y.S.2d 553 (1958), as in the instant case, the insured failed to disclose a heart condition in his application for insurance and, in response to a question calling for the names of doctors he had consulted or been treated by in the five years preceding the date of the application, failed to disclose the physician who had been treating him for the condition. The insurer introduced testimony indicating that it would not have issued the policy had it known of the heart condition. The Court, in reversing the trial court's order denying the insurer's motion to dismiss the complaint, held:

> "In the light of all the circumstances and the uncontradicted proof that appellant would have rejected the application if appellant had been furnished the information that it sought, the compliant should have been dismissed as a matter of law." At 555.

In *Wageman* v. *Metropolitan Life Ins. Co.*, 263 N.Y.S.2d 915 (1965), plaintiff omitted in his application for insurance a history of treatment for hypertension. The insurer's underwriter testified that if the company had known of this history, it would have declined to issue the policy. This testimony went uncontradicted. The Court, in com-

menting on this testimony, reversing the jury verdict and entering a verdict for the insurer, held:

> "The omissions from the answer and the misleading answers given by plaintiff in his application were material as a matter of law . . . In any event, defendant's medical examiner's testimony, without contradiction established that the answers to the question influenced the insurer and were therefore material." At 917-18.

See, also, *Reznekoff* v. *Equitable Life Assur. Co.*, 45 N.Y.S.2d 650 (1943); *Home Life Ins. Co.* v. *Kupfer*, 117 N.Y.S.2d 352 (1952); *Archese* v. *Equitable Life Assur. Soc.*, 223 N.Y.S.2d 95 (1961); and *Greene* v. *United Mutual Life Ins. Co.*, 283 N.Y.S.2d 809 (1963).

V. PETITIONER HAS DEMONSTRATED NO GROUNDS FOR THIS COURT TO GRANT CERTIORARI

Petitioner has not made a sufficient showing that any of the considerations set forth in Rule 19 of this Court apply in this case. Nor has it been demonstrated that any other ground exists which would cause this Court to grant Certiorari.

Petitioner's central arguments are that the Sixth Circuit's decision is in conflict with one of its earlier decisions and with decisions of the Michigan Court of Appeals and that it was deprived of its right to a trial by jury. Respondent submits, based upon the above discussion of these grounds, that neither has any merit.

CONCLUSION

Respondent respectfully requests that the Petition for a writ of Certiorari be denied.

Respectfully submitted,

John E. S. Scott
Attorney for Respondent
Massachusetts Mutual
Life Insurance Company
800 First National Building
Detroit, Michigan 48226
313-962-5860

Robert S. Krause
DICKINSON, WRIGHT,
McKEAN & CUDLIP
Of Counsel on the Brief
800 First National Building
Detroit, Michigan 48226
313-962-5860